



Termination of the Parent-Child Relationship

7/10/14

In ***In Re K.W.***, 12 N.E.3d 241 (Ind. 2014), the Court vacated the portion of the trial court's order terminating Mother's parental rights to her child. The child was born on August 22, 2011, and adjudicated a CHINS on December 15, 2011. On November 1, 2012, after repeated instances in which Mother and Father discontinued services, tested positive for drugs, or were arrested, DCS filed a petition to terminate their parental rights. The termination hearing was initially set for January 25, 2013. At a pretrial hearing on January 17, 2013, Mother and Father separately requested a continuance. Both DCS and the child's Guardian ad Litem objected to the continuance request, but the trial court continued the hearing until March 12, 2013. On March 11, 2013, the DCS attorney filed an emergency motion for a continuance because a family illness would prevent her from being in court the next day, and she was unable to obtain substitute counsel on such short notice. Neither Mother nor Father objected to this continuance request and the trial court reset the hearing for April 22, 2013. Mother was incarcerated at the Marion County Jail on the day of the hearing, so her attorney moved for another continuance. Mother's attorney stated that Mother had been in jail for a few weeks, but she anticipated being released on May 1, 2013 to work release or home detention. Mother's attorney did not make a specific request to have Mother participate telephonically or by video teleconference in lieu of a continuance. The trial court had previously granted DCS's motion for two of its out of state witnesses to testify telephonically. Both DCS and the child's Guardian ad Litem objected to the continuance. The trial court denied Mother's motion for a continuance and held the termination hearing with Mother absent but represented by her attorney. Mother's attorney aptly cross-examined DCS's witnesses and presented brief testimony from the child's maternal grandmother at the termination hearing. On May 1, 2013, the trial court issued an order terminating Mother's and Father's parental rights to the child, who was two years old, healthy, and doing well in preadoptive care.

Mother appealed, arguing that the juvenile court violated her due process rights when it denied her motion for a continuance and held the termination hearing without her being present. The Court of Appeals affirmed the juvenile court's denial of Mother's motion in an unpublished memorandum decision, concluding that the evidence supporting the termination of Mother's parental rights was overwhelming. The Supreme Court granted transfer, thereby vacating the Court of Appeals decision.

The Court concluded that, under the facts and circumstances of this case, the trial court abused its discretion in denying Mother's motion to continue the termination hearing and proceeding instead without her participation. *Id.* at 249. The Court noted that, generally

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speaking, a trial court's decision to grant or deny a motion for a continuance is subject to abuse of discretion review. *Id.* at 243-44. Quoting Rowlett v. Vanderburgh Cnty. Office of Family and Children, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), *trans. denied*, the Court observed that “[a]n abuse of discretion may be found in the denial of a motion for continuance when the moving party has shown good cause for granting the motion,” but “no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial.” K.W. at 244. Mother argued that the test outlined by the Court in In Re C.G., 954 N.E.2d 910, 922-23 (Ind. 2011) should be applied to her case. The Court noted the following factors listed in C.G. at 922-23: (1) the delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending; (4) the best interests of the child(ren) in reference to the parent's physical attendance at the testimony hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her own attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience of transporting a parent from his or her place of incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors. K.W. at 244. The Court disagreed with Mother's argument, stating that the test from In Re C.G. applies to consideration of a motion to *transport* an incarcerated parent to a termination hearing, a procedure Mother did not undertake, and not to a motion to continue the termination hearing until the parent is no longer incarcerated (emphasis in opinion). K.W. at 244. The Court said that the application of the C.G. test was not compelled in the K.W. case, but found a number of those factors to be helpful in the Court's review of the trial court's exercise of its discretion. K.W. at 244. After discussing the factors, the Court found that: (1) the delay that would have resulted from the continuance could have been as short as two weeks because Mother expected to be released from jail within that time period; (2) this delay would have been a minimal inconvenience to all others involved (although the Court recognized that the record did not indicate that the courtroom, staff, parties, and witnesses would have been available on such notice); (3) the proceeding had not been overly drawn out or delayed; (4) this was not a case where there was an overwhelming sense of urgency since the child was two years old, not at risk of physical or emotional abuse, and was healthy and doing well; (5) Mother had a substantially significant interest in being present at the proceedings. Id. at 244-248. The Court observed that, by the time Mother's motion to continue was made, the trial court was presented with only one choice, continue the trial (i.e., allow Mother to be present or use an alternate method) or proceed without Mother's voice being heard at all. Id. at 248.

The Court said that, rather than continue the termination hearing for a short time until Mother's release date or accommodate a readily available alternative means for her to present testimony, the trial court opted to carry out a proceeding by which Mother's fundamental rights to parental autonomy were challenged, attacked, and taken away, without her personal participation in any way. Id. The Court found that Mother showed good cause as to why her motion should have been granted, and to do otherwise was clearly against the logic and circumstances of the case. Id. The Court also found that Mother was prejudiced as a result of the denial of her motion for

continuance, stating that “even though there is no absolute constitutional right for a parent to be present at a termination hearing, In Re C.G., 954 N.E.2d at 921, this does not invariably correlate to a conclusion that it is permissible to omit the parent from participating in the process entirely.” K.W. at 248-49. Quoting Tillotson v. Dept. of Family and Children, 777 N.E.2d 741, 774 (Ind. Ct. App. 2002), the Court said that, although a parent may not have an absolute right to be *present* at a termination hearing, “such parent does have the right to be heard at a meaningful time and in a meaningful manner.” (Emphasis in opinion.) K.W. at 249. The Court explained that this is the essence of the entire concept of due process. Id. The Court found that, although Mother’s attorney attempted to mount a defense by cross-examining DCS witnesses and putting on one of his own, that is a far cry from saying that Mother was heard at a meaningful time and in a meaningful manner, and far from being fundamentally fair; it was therefore prejudicial. Id.

The Court noted and commented on DCS’s concern that IC 31-35-2-6(a)(2) provides for a 180 day window for a trial court to complete the termination hearing, and that the deadline in this case was on April 30, 2013, which would pass before Mother’s prospective release from incarceration. Id. at 245 n.3. The Court also noted that IC 31-35-2-6(b) provides that failure to meet this deadline means the trial court, upon motion by a party, shall dismiss the petition to terminate the parent-child relationship without prejudice.” Id. The Court said that three things keep this statutory frame work from weighing against Mother: (1) Mother would have to file such a motion to dismiss, an action which the Court would not presume would occur after her own continuance pushed the hearing over the deadline; (2) the missed deadline would not end the matter, since, even if the petition were dismissed without prejudice, DCS could simply file a new termination petition; (3) the fact that the case was backed up against the statutory deadline was not entirely, or even mostly, Mother’s fault, since DCS was at least somewhat accountable for the time crunch, because it had previously sought an emergency continuance. Id.